Internal Revenue Service

memorandum

DL-100046-96
Br4:JBernstein

date: FEB 10 1997

to: Assistant to the Deputy Commissioner C:D

from: Assistant Chief Counsel (Disclosure Litigation) CC:EL:D

subject: Authority of the National Archives and Records Administration to Access Tax Information Under I.R.C. §§ 6103(h)(1) or (n)

In December of 1995, the National Archives and Records Administration (NARA) completed its evaluation of the Internal Revenue Service's records management program. At the conclusion of that review, Service and NARA personnel formed an Interagency Working Group to resolve issues concerning NARA's access to Service records for appraisal purposes. As an outgrowth of the Group's efforts, NARA asked the Service to consider whether a NARA employee could become a detailed or deputized Service employee under section 6103(h)(1), or a service provider/ contractor to the Service under I.R.C. § 6103(n). The purpose of such a designation would be to enable the NARA employee to review tax information, thereby assisting NARA in carrying out its Title 44, U.S.C., responsibilities of identifying and preserving records of historical value.

The answer to NARA's inquiry will also be relevant in responding to the Conference Report accompanying the Service's FY 1997 budget, which calls for a report addressing, among other things, the need for NARA and the Service to reach an agreement on NARA's access to Service records.[1]

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[1] Specifically, the Conference Report states:

The conferees believes [sic] that an agreement should be reached between the IRS and the National Archives and Records Administration (NARA) concerning NARA's access to certain IRS records. The conferees direct that the IRS and NARA submit a report to the Committees on Appropriations of the House and Senate on NARA's access to records. This report must include an analysis of outstanding issues and a recommendation on how the disposition of these records should proceed. The report should be submitted to the Committees by March 1, 1997.

H.R. Conf. Rep. No. 863, 104th Cong., 2d Sess. 1149 (1996).

ISSUE

Whether a NARA employee can review tax information under I.R.C. § 6103(h)(1) as a detailed or deputized, Service employee, or under I.R.C. § 6103(n) as a contractor to the Service, to assist NARA in carrying out its Title 44, U.S.C., responsibilities of identifying and preserving records of historical value.

CONCLUSION

In order to access tax information under either I.R.C. §§ 6103(h)(1) or (n), the activity being performed must be one involving tax administration. NARA's administration of Title 44 is not a matter involving tax administration. Therefore, neither I.R.C. § 6103(h)(1) nor (n) would authorize a NARA employee to review tax information to enable NARA to carry out its Title 44 activities. This situation is distinguishable from one in which the Service utilizes the expertise of an employee of another agency to assist the Service in carrying out its Title 26 activities.[2]

BACKGROUND

NARA operates as the nation's historian, and is interested in identifying, preserving, and ultimately making available to the public records, including tax records, which it finds to be useful for historical and other research. NARA carries out this role in a number of different ways. Under 44 U.S.C. § 2107, NARA will accept for deposit records which it determines to have sufficient historical or other value to warrant continued preservation by the federal government. To further its role as historian, NARA also can direct and effect the transfer (to NARA) of agency records in existence for more than 30 years that NARA has determined to have sufficient historical or other value to warrant preservation. The head of an agency directed to transfer records in existence for more than 30 years can choose to maintain such records after certifying that the records must be retained for the conduct of the agency's regular current business. Once records are transferred to NARA, it is responsible for preserving the former agency records and making them available to the public. 44 U.S.C. §§ 2109, 2110, 2901(9).[3]

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[2] This memorandum addresses issues related to the application of I.R.C. § 6103. Questions related to the proper method of employing, detailing, or utilizing the services of an employee from another federal agency should be directed to the Assistant Chief Counsel (General Legal Services), CC:F&M:GLS.

[3] When records, determined to have continuing value to warrant preservation, are transferred to the National Archives, custody of the transferred agency records shifts from the agency to NARA. 44 U.S.C. § 2108(a); 36 C.F.R. § 1228.180(b). NARA is subject to the same statutory limitations and restrictions on the use and examination of such records as the transferring agency. 44 U.S.C. § 2108(a). In addition, if the head of an agency states in writing restrictions that appear to be necessary or desirable with respect to the use or examination of records being considered for transfer to NARA, the

NARA also has authority to determine the value of agency records for final disposition and to approve disposal schedules for agency records that do not have "sufficient administrative, legal, research, or other value to warrant their continued preservation by the Government." 44 U.S.C. § 3303a(a). The Title 44 procedures prescribe the exclusive means by which federal records may be destroyed. 44 U.S.C. § 3314.

Pursuant to 44 U.S.C. § 2904, NARA performs a records management role in which it guides and assists agencies in the creation, maintenance, and disposition of records. NARA is also responsible for establishing "standards for the selective retention of records of continuing value" and assisting "Federal agencies in applying the standards to records in their custody." 44 U.S.C. § 2905(a).[4]

It is the responsibility of NARA and the head of each federal agency to prevent the unlawful removal or destruction of agency records in their custody. 44 U.S.C. §§ 2905, 3106. NARA and the head of each agency must notify each other upon knowing of actual, impending, or threatened unlawful removal, defacing, alteration, or destruction of records in their custody. 44 U.S.C. §§ 2905, 3106.[5]

As noted, the NARA/Service Interagency Working Group has been addressing the disposition of records in the former Office of the Executive Secretariat, case files in the Criminal Investigation (CI) division, and corporate returns. With regard to the disposition of these records, some of which contain tax information protected by section 6103, the Service and NARA are making progress in resolving disposition issues without breaching the confidentiality requirements of section 6103 or Rule 6(e) of the

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Archivist shall, if he concurs, impose these restrictions and may not relax or remove them without the consent of the head of the transferring agency. 44 U.S.C. § 2108(a). Once records are in existence for 30 years, NARA can obtain and open them up for inspection even if they had been subject to statutory restrictions. 44 U.S.C. §§ 2107(2), 2108(a). However, the Archivist may, with the consent of the head of the transferring agency, order that such restrictions remain in place for a longer period if doing so is consistent with the standards established in relevant statutory law. 44 U.S.C. § 2108(a).

[4] Federal agencies are required to establish and maintain programs for the management of their records. 44 U.S.C. § 3102.

[5] In the event that a federal agency head fails to initiate an appropriate response to the unlawful removal or destruction of agency records, the Archivist shall request the Attorney General to recover records unlawfully removed or to seek other means of redress and shall notify Congress of its request for the Attorney General's intervention. 44 U.S.C. §§ 2905, 3106. In addition, there is a maximum penalty of $2,000 and/or 3 years in prison for the willful and unlawful destruction, damage, or alienation of federal records. 18 U.S.C. § 2071; see, 36 C.F.R. § 1228.102.

I.R.C. § 6103 contains no specific exception that would authorize the Service to disclose tax information to NARA for purposes of NARA carrying out its Title 44, U.S.C. responsibilities. Although Congress did provide for the disclosure of tax information to a number of agencies to assist in carrying out their responsibilities (see, I.R.C. §§ 6103(g)-(o)), Congress did not expressly provide for the disclosure of tax information to NARA. As a result, NARA cannot review tax information for historical determinations and for potential classification as permanent records not to be destroyed.

B. Office of Legal Counsel Opinions - Section 6103 and NARA

On three occasions, the Department of Justice's Office of Legal Counsel (OLC) has addressed the relationship between I.R.C. § 6103 and NARA's authority under Title 44 to review records of federal agencies. On each occasion, the OLC has concluded that I.R.C. § 6103 prohibits the disclosure of tax information to assist NARA in carrying out its Title 44 duties. In considering the legality of transferring Watergate Special Prosecution Force records to NARA, OLC determined in 1977 that I.R.C. § 6103 prohibited a transfer of tax information to NARA. While OLC recognized that NARA's statutes generally allowed NARA to obtain and open up for inspection 30-year old records that are subject to statutory restrictions, OLC on balance concluded that I.R.C. § 6103 itself and its legislative history were indicative of legislative intent that tax information not be transferred to NARA, since disclosure could only take place to the extent specifically authorized in I.R.C. § 6103. As further support for its conclusion that Congress did not intend that tax records be transferred to NARA, OLC pointed out that the rigid safeguard provisions of I.R.C. § 6103 were clearly designed to deal with the disposition of tax information upon completion of an agency's use.[9] Transfer of Watergate Special Prosecution Force Records to the National Archives--Income Tax Information--26 U.S.C. § 6103(a), 77-54, 1 Op. Off. Legal Counsel 216 (1977).

In 1980, the OLC reaffirmed its 1977 opinion and reiterated that no basis existed to permit NARA's archival access to tax information, even though the tax information was in FBI files. Memorandum from Leon Ulman, Deputy Assistant Attorney General, OLC, to Alice Daniel, Assistant Attorney General, Civil Division (November 7, 1980).

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[9] I.R.C. § 6103(p) (4) (F) (ii) provides that when an agency completes its use of tax information, it must:

(I) return to the Secretary such returns or return information (along with any copies made therefrom),
(II) otherwise make such returns or return information undisclosable, or
(III) to the extent not returned or made undisclosable, ensure that the conditions of subparagraphs (A), (B), (C), (D), and (E) of this paragraph [safeguard requirements established by the Secretary] continue to be met with respect to such returns and return information . .

In 1986, for the third time, the OLC determined that NARA did not have the authority to obtain tax information, the disclosure of which is strictly protected by I.R.C. § 6103.

> We must assume that the members of Congress who voted for the Tax Reform Act [of 1976] understood it to mean what the plain language of section 6103(a) says, viz., that tax returns and tax return information would be disclosed only under the carefully prescribed conditions set out in the Act. We think it is unrealistic to assume Congress intended (but neglected to mention) that such materials could also be subject to disclosure under the Archives provisions.

Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney General, OLC, to Richard K. Willard, Assistant Attorney General, Civil Division (February 27, 1986).[10]

C. Case law Restricting NARA's Access to Tax Information

The U.S. Court of Appeals for the District of Columbia Circuit addressed whether I.R.C. § 6103 authorized NARA to inspect tax information contained in FBI files in order to develop a detailed records retention plan for FBI records management purposes. American Friends Service Committee v. Webster, 720 F.2d 29, 69-71 (D.C. Cir. 1983). With respect to section 6103, the American Friends case acknowledged that tax records may be transferred to records centers operated by NARA for storage purposes pursuant to section 6103(n), since that section specifically authorized disclosures to third parties for storage purposes.[11] However, the Court concluded that inspection of the tax information in the FBI's possession to improve the FBI's records management practices

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[10] It is interesting to note that the President John F. Kennedy Assassination Records Collection Act of 1992, requiring transmission to NARA and public disclosure of records related to the assassination investigation, takes precedence over any other laws, judicial decisions, or common law doctrine except I.R.C. § 6103. President John F. Kennedy Assassination Records Collection Act of 1992, Pub. L. No. 102-526, § 11(a), 106 Stat. 3443, 3457 (1992). Hence, as is the case with respect to NARA's inability, generally, to access tax information, Congress in 1992 again excluded tax information from NARA's specific statutory mandate even though such information might have related to the Kennedy assassination investigation.

[11] When records are transferred to the National Archives, responsibility for the custody, use, and withdrawal of the transferred agency records shifts from the agency to the Archivist. 36 C.F.R. § 1228.180. Records transferred to a Federal Records Center, as opposed to the Archivist, are considered to be maintained and controlled by the agency depositing the records. 36 C.F.R. § 1228.162. NARA's role with respect to Federal Records Centers is merely to operate the Centers to meet the storage, processing and servicing needs of federal agencies. The Service reimburses NARA to store its records at Federal Records Centers. As noted above, I.R.C. § 6103(n) specifically authorizes any disclosures of tax information incidental to storing records for tax administration purposes.

and programs would serve no tax administration purpose. The Court went on to say that section 6103(n) and its implementing regulations "contain no prescriptions about records management inspection by the Archives." American Friends Service Committee v. Webster, 720 F.2d at 71.

D. Scope of Section 6103

Section 6103 is not a barrier to NARA's access to documents which do not contain tax information. Nor does section 6103 restrict access to an entire document which happens to contain some tax information. The Service has long recognized a distinction between documents that constitute tax information protected by section 6103 and documents that merely contain some tax information. Documents that do not relate in their entirety to a return or the liability of a specific taxpayer, but instead refer to a taxpayer in the discussion of a broader issue, merely contain tax information. In these situations, only those portions pertaining to the specific taxpayer would be return information protected by section 6103. This tax information can be edited from the document so that the remaining portions can be inspected by NARA. On the other hand, documents that constitute tax information in their entirety (such as a revenue agent's report generated during a specific taxpayer's examination) cannot be edited so as to take the document outside the parameters of section 6103. Church of Scientology v. Internal Revenue Service, 484 U.S. 9 (1987).

II. THE APPLICABILITY OF I.R.C. § 6103(h)(1) AND (n) TO NARA

A. I.R.C. § 6103(h)(1) and § 6103(n)

Section 6103(h)(1) permits the disclosure of tax information to employees of the Department of Treasury (including the Service) whose official duties require the disclosure of such information for **tax administration purposes**. Even within the Service, employees do not have unlimited access to tax information.[12] Essentially, section 6103(h)(1) permits access to tax information when a Service employee has an official "need to know" the tax information for purposes of tax administration.[13] IRM 1272 (22)42, Disclosure of Official Information Handbook.

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[12] The Service has investigative jurisdiction for certain Bank Secrecy Act and money laundering violations. 31 C.F.R § 103.46(c)(2); Treasury Directive 15-41 (December 1, 1992); Treasury Directive 15-42 (September 11, 1995). However, a Service employee can access tax information in conjunction with such an investigation only if that investigation involves tax administration. I.R.M. 9781 ¶ 591, Handbook for Special Agents. Even the Service's Records Officer does not have unlimited access to Service files. The Records Officer has no authority to inspect the contents of individual investigative case files. I.R.M. 1(15)14, Records Administration.

[13] The same standard is applied to other components of the Department of the Treasury. For example, the United States Customs Service does not have tax administration responsibilities, and therefore cannot obtain tax information without a

Section 6103(n) permits the disclosure of tax information to any person to the extent necessary for, among other activities, providing services **for tax administration purposes.** Specifically, section 6103(n) provides:

> [p]ursuant to regulations prescribed by the Secretary, returns and return information may be disclosed to any person . . . to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, **for purposes of tax administration**. (Emphasis added.)[14]

Thus, while sections 6103(h)(1) and (n) provide authority for disclosing tax information under certain circumstances, such disclosures must be for tax administration purposes.

The term "tax administration" is defined in section 6103(b)(4) to include, among other things, the administration, management, conduct, direction and supervision of the execution and application of the internal revenue laws.. Specifically, section 6103(b)(4) defines the term "tax administration" as follows:

> (A) means—
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> (i) the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes (or equivalent laws and statutes of a State) and tax conventions to which the United States is a party, and
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> (ii) the development and formulation of Federal tax policy relating to existing or proposed internal revenue laws, related statutes, and tax conventions, and
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> (B) includes assessment, collection, enforcement, litigation, publication, and statistical gathering functions under such laws, statutes, or conventions.

Thus, the plain language of the term "tax administration", as defined in section 6103(b)(4), does not encompass NARA's Title 44 records management or archival

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specific exception in I.R.C. § 6103. See, I.R.C. § 6103(l)(14)(authorizing certain disclosures to Customs).

[14] Under I.R.C. § 6103(n), the disclosure must be necessary to carry out the tax administration purpose. According to Treasury Regulations implementing section 6103(n), a disclosure is necessary only when the tax administration service cannot otherwise be reasonably, properly or economically performed. Treas. Reg. § 301.6103(n)-1(b).

activities. This conclusion is supported by an analysis of the legislative history and case law interpreting section 6103.

1. Legislative History

The legislative history of section 6103 provides no background regarding the term "tax administration" as defined in section 6103(b)(4). The legislative history, however, does indicate that the primary objective of Congress in revising section 6103 in 1976 was to balance citizen privacy and the viability of the tax system, against the interests asserted by other agencies desiring access when such access might affect their ability to perform their own, nontax, functions. The legislative history clearly reflects the concern of Congress as to the consequences of making tax information available for purposes unrelated to the administration and enforcement of the internal revenue laws. S. Rep. No. 938, 94th Cong., 2d Sess. 316-19 {1976), 1976-3 C.B. (Vol. 3) 354-57.

Congress interjected the "tax administration" concept into the statutory scheme of section 6103 and clearly differentiated between tax and nontax matters. See, United States v. Bacheler, 611 F.2d 443 (3d Cir. 1979). This conclusion becomes evident after contrasting both the statute and those passages of the legislative history dealing with disclosures to the Department of Justice (DOJ) under section 6103(h) with those dealing with disclosures to DOJ and other federal agencies under sections 6103(i) and (l). Congress recognized the need for the Department of Justice to be able to access tax information in carrying out its duties in civil and criminal tax matters, but imposed disclosure restrictions in nontax criminal matters. Congress also provided no general disclosure exceptions for nontax civil matters. S. Rep. No. 938, 94th Cong., 2d Sess. 323-31 (1976), 1976-3 C.B. (Vol. 3) 361-69.[15]

Furthermore, Congress recognized that there are instances where the Service jointly participates in the administration of programs with other federal agencies, such as the Social Security Administration and the Railroad Retirement Board, as well as the Department of Labor and the Pension Benefit Guaranty Corporation on matters related to the Employee Retirement Income Security Act of 1974. Congress, however, considered disclosures to enable these agencies to administer their responsibilities under the above-described programs as not involving tax administration. I.R.C. §§ 6103(l)(1) and (2); S. Rep. No. 938, 94th Cong., 2d Sess. 334-35 (1976), 1976-3 C.B. (Vol. 3) 372.-73.

[15] There is often a close nexus between the commission of a tax crime and a nontax crime. For example, a nontax criminal offense involving money may result in the commission of tax fraud. A public official may omit income resulting from a bribe or received from a narcotics trafficker, and omit the income in order to conceal the nontax criminal offense. The taxpayer may be guilty of two offenses, a Title 26 offense and a Title 18 offense. Notwithstanding the nexus between these offenses, the nontax crime is not one involving tax administration. See, Treas. Reg. § 301.6103(h)(2) -1(a)(2)(ii).

2. Case law Involving Tax Administration

Courts have examined specific factual scenarios to determine whether or not they involved tax administration. Although no definite test has emerged, the case law makes clear that tax administration must involve activities pertaining to the administration of the Internal Revenue Code (or related tax statutes of a state taxing authority). E.g., United States v. Mangan, 575 F.2d 32 (2d Cir.), cert. denied, 439 U.S. 931 (1978) (use of former IRS agent's returns in a criminal proceeding against the agent for obtaining tax refunds in name of other taxpayers involved tax administration); Rueckert v. Internal Revenue Service, 775 F.2d 208 (7th Cir. 1985) (conduct inquiry involving state revenue fraud agent relates to state tax administration).[16]

B. NARA's Mission and Tax Administration

Although NARA's archival and records management functions are distinct, they are related, and to some extent, co-dependent. As was discussed above, NARA provides guidance to federal agencies on records management and disposition issues, and reviews and approves records disposition schedules for records determined to lack sufficient value to warrant preservation. NARA also is charged with accepting records which it has determined to have sufficient historical or other value to warrant continued preservation by the federal government. NARA's performance of its duties in the records disposal process is at the heart of its reason for existence, and ties directly into its role of making independent judgments as to which records have sufficient historical or other value to warrant continued preservation by the federal government. See, American Friends Service Committee v. Webster, 720 F.2d at 44.

It would not be inconsistent with I.R.C. § 6103 for a Service employee or contractor to access tax information for the assigned purpose of determining its value as a reference or other resource to assist the Service in carrying out its **tax administration** duties. However, under Title 44, NARA's determination that a record be permanently maintained is based on its decision that the record has general historical or other value. Determining historical or research value to the federal government as a whole, or to the public at large, is far different than determining value to the Service in administering and enforcing the internal revenue laws.[17] NARA's interest in reviewing Service records

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[16] As was noted earlier, NARA can prohibit the Service from destroying records. The Service may therefore incur costs in storing such records, costs which could otherwise be spent to directly support the administration of the internal revenue laws. While NARA's Title 44 prerogatives may thus affect tax administration, this ability to affect tax administration does not transform NARA's Title 44 role into one involving tax administration.

[17] For example, the Service may have on file a tax return on an individual who at some time later in life becomes famous through sports, entertainment, or politics, or simply through the accumulation of wealth. Similarly, the Service may have conducted a

the Internal Revenue Code. Simply stated, sections 6103(h)(1) or (n) cannot be used to provide NARA with tax information to carry out its Title 44 responsibilities of identifying and preserving records of historical value.[19]

/s/
JOHN B. CUMMINGS

Attachment:
N.Y. Times Article

[19] Reliance on I.R.C. §§ 6103(h)(1) or (n) for disclosure would not enable NARA to carry out any independent role in reviewing tax records for historical value. A predicate to access under section 6103(h)(1) is that the individual must be an employee of the Service. Under section 6103(n), the individual must be the Service's contractor. In either instance, the individual would be required to operate, with tasks assigned by, and with accountability to, the Service. This type of relationship is consistent with employer/employee and principal/agent principles. It is also consistent with other provisions of the internal revenue laws. Specifically, I.R.C. § 7801(a) indicates that the administration and enforcement of Title 26 is to be performed under the supervision of the Secretary of the Treasury. I.R.C. § 7802(a). The Secretary of the Treasury has delegated the responsibility for the administration and enforcement of the internal revenue laws to the Commissioner of the Internal Revenue pursuant to Treasury Order No. 150-10 (April 22, 1982). Finally, even if the Service concluded that NARA's Title 44 duties served a tax administration purpose, a NARA employee evaluating tax information under I.R.C. §§ 6103(h)(1) or (n) would be prohibited from further disclosing such information to NARA.